

# CONSIDERING THE BEST INTERESTS OF THE CHILD IN DECISIONS ON INCARCERATION OF CARE-GIVERS IN MALAWI

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## Introduction

In 2001 the African Commission on Human and People's Rights (ACHPR) Special Rapporteur on Prisons and Conditions of Detention in Africa, after a visit to Malawi prisons, contended that the prison is not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers.<sup>3</sup> She argued for creative solutions to minimise the imprisonment of pregnant women and primary care-givers, such as the use of bail for remand prisoners, non-custodial sentences, conditional/early release, parole, probation, or suspended sentences for convicted prisoners.<sup>4</sup> Despite such recommendations, children continue to be found in prisons in Malawi. Conversely, children of convicted women will often be separated from their mothers, who are typically the primary care-givers.<sup>5</sup> Whether detained with or separated from parents, children of incarcerated parents are vulnerable and are entitled to specific kinds of care and protection.

The concern with babies and young children born, living and/or growing up inside prisons has received a lot of attention in Malawi's media recently.<sup>6</sup> It is generally agreed that prisons are not an appropriate environment for children. While authors agree that there is a limited body of research thoroughly examining the plight of children in prison or the impact of children living in prison,<sup>7</sup> the harsh, punitive environment of prisons is considered an impediment to early childhood development, which can damage the psychological and mental well-being of children.<sup>8</sup> Children

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- 3 VM Chirwa "Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi" (17-28 June 2001) 36, available at [http://www.achpr.org/files/sessions/30th/mission-reports/malawi/achpr30\\_misrep\\_specmec\\_priso\\_malawi\\_2001\\_eng.pdf](http://www.achpr.org/files/sessions/30th/mission-reports/malawi/achpr30_misrep_specmec_priso_malawi_2001_eng.pdf) (last accessed: 18 November 2016).
- 4 *Id.*
- 5 Most literature on children of incarcerated care-givers refers specifically to children with imprisoned mothers because mothers tend to be the primary care-givers of children and it is imprisonment of mothers that often results in the greatest impact on the family. However, it is now generally recognised that this also applies to fathers, foster parents or other primary care-givers. This is particularly true in Africa where many children are orphaned or living separately from their parents. African Committee of Experts on the Rights and Welfare of the Child (ACERWC), General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Care-givers" (2013).
- 6 See O Khamula "Advocacy Group Bemoans Increased Number of Babies in Malawi Prisons" *Nyasa Times* (7 December 2015) available at <http://www.nyasatimes.com/advocacy-group-bemoans-increased-number-of-babies-in-malawi-prisons/#sthash.dZizBYx9.dpuf> (last accessed 18 November 2016).
- 7 O Robertson "Children Imprisoned by Circumstance" *Quaker United Nations Office* (2008) 1.
- 8 E Kamwendo "The Invisible Prisoners: A Case of Children in Malawian Prisons" *Lund University Master Thesis* (2009) 22, available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=1398803&fileOid=1423180> (last accessed: 18 November 2016).

imprisoned with their mothers in Malawi face particularly acute challenges since lack of funding from the government prevents the Malawi Prison Service from providing the basic needs of the children.<sup>9</sup> The children in prison are not provided with a special diet, rather, mothers share the food issued to them with their children, and this occurs in the midst of already frequent prison food shortages.<sup>10</sup> In addition there is no adequate provision for breast-feeding mothers. The health services in prison are inadequate to cope with the needs of babies and small children. Only Zomba Central Prison provides children with a chance of attending nursery school, whilst other prisons do not have nursery schools.<sup>11</sup> The prisons, moreover, do not have recreational facilities for the children. The children spend most of their time with adults inside the prison and do not have a chance to play and interact freely with other children.<sup>12</sup>

While the physical presence of infants and toddlers in prison is an issue of grave concern, it sometimes overshadows the equally problematic plight of children who are separated from their care-givers when they are incarcerated. The number of children separated from parents due to incarceration is unknown because judicial, prison and other systems rarely track this data.<sup>13</sup> Psychologists argue that the separation of children from their care-givers may have serious negative repercussions for the children. Children with incarcerated care-givers are at increased risk for antisocial behaviour compared with their peers.<sup>14</sup> Children with an incarcerated care-giver experience a variety of emotional and behavioural problems after separation including worsening performance and attendance rates at school and displaying increased aggression, antisocial or criminal tendencies.<sup>15</sup> In addition, the children are at risk of receiving inadequate care since imprisoned women often rely on the extended family, which may be buckling under socio-economic stresses, to care for their children. This situation is further exacerbated by the fact that in Malawi, as in many other African countries, some prisons do not have facilities for women, so women are frequently placed in prisons further from their homes.<sup>16</sup>

9 Centre for Human Rights Education, Advice and Assistance (CHREAA) Press Release "Malawi Prison Health Service Needs Reform" (5 June 2014) available at <http://chreaa.org/press-release-malawi-prison-health-service-needs-reform/> (last accessed: 18 November 2016).

10 E Kamwendo, "The Invisible Prisoners: A Case of Children in Malawian Prisons" *Lund University Master Thesis* (2009) 32.

11 Presentation by Agnes Patemba, Chief Resident Magistrate (East), at a workshop for magistrates on imprisoning mothers with their children held in Lilongwe on 15 December 2015. The workshop was organised by CHREAA and the Southern Africa Litigation Centre (SALC).

12 *Id.*

13 O Robertson "The impact of parental imprisonment on children" *Women in Prison and Children of Imprisoned Mothers Series Quaker United Nations Office* (2007) 7.

14 J Murray, D Farrington and I Sekol, "Children's Antisocial Behaviour, Mental Health, Drug Use, and Educational Performance after Parental Incarceration: A Systematic Review and Meta-Analysis" (2012) 138(2) *Psychological Bulletin* 175.

15 O Robertson "The impact of parental imprisonment on children" *Women in Prison and Children of Imprisoned Mothers Series Quaker United Nations Office* (2007).

16 S Twea, "Women as offenders – the social and legal circumstances of women who commit crimes: A case study of selected prisons in Malawi" *University of Zimbabwe, Dissertation* (2004); see also L Vetten "The Imprisonment of women in Africa" in Sarkin (ed) *Human Rights in African Prisons* (2008) 134 to 154.

## The Legal Framework

The Constitution of the Republic of Malawi in its principles of national policy provides that:

“The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—

(h) Children

To encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society.”<sup>17</sup>

Section 23 of Malawi’s Constitution also provides that:

- 1) “All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be the primary consideration in all decisions affecting them.
- 2) ...
- 3) Children have the right to know, and to be raised by, their parents.”

Section 3(1) of the Child Care, Protection and Justice Act (CCPJ)<sup>18</sup> provides that:

- 1) “In addition to the duties and responsibilities imposed by section 23 of the Constitution, a parent or guardian-
- 2) shall not deprive a child of his or her welfare;
- 3) has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to- (i) protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards; (ii) provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention”.

Malawian law provides that a breastfeeding child of a female prisoner may be permitted to live with the mother until the child has been weaned. Section 60 of the Prisons Act<sup>19</sup> provides that:

“Subject to such conditions as may be specified by the Commissioner any unweaned infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessities at the public expense.”

Once the child has been weaned, the Prison Service is required to place the child with a relative or family friend able and willing to support the child and, in the absence of such a person, with a government-approved child care provider.<sup>20</sup>

In most cases women who take their children with them to prison do so because there is no relative or friend to take care of them. So where the officer in charge of the prison exercises his power to remove the child from prison, often the only option available would be to hand over the child to a welfare authority. However, there are very few welfare authorities in Malawi. The CCPJ Act

17 Constitution of Malawi, 1994, section 13(h).

18 Child Care, Protection and Justice Act (CCPJ) (No. 22 of 2010).

19 Prisons Act, Cap. 9:02 of the Laws of Malawi, section 60.

20 *Id.*

provides for public and private foster homes, but currently Malawi does not have a lot of public foster homes to take in children in need of care and protection as envisaged by the Act and the reality is thus that a government approved child care provider is seldom accessible.<sup>21</sup>

Malawi law allows judicial officers to order pre-sentencing reports which enable a court to inquire into the circumstances of the person being sentenced, including whether they are the primary care-giver of any children and the effect that their incarceration will have on their children. Section 260 of the Criminal Procedure and Evidence Code<sup>22</sup> states: “(1) The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.” Section 321J states: “(1) Where a verdict of guilty is recorded, the High Court may, after judgment but before passing sentence, receive such information or evidence as it thinks fit, in order to inform itself as proper to the proper sentence to be passed.” According to subsection (2) of both provisions, “The information or evidence that the court may receive... may... include information or evidence by or on behalf of the victim of the offence and any relevant reports to enable the court to assess the gravity of the offence.” These reports may include information on whether the convicted person is a primary care-giver.<sup>23</sup>

## International and Regional Law Framework

In addition to Malawi’s obligations under its domestic law, Malawi is signatory to both continental and global legal instruments that provide best practice on the issue of incarceration of care-givers and considerations of the best interests of the child.<sup>24</sup> In particular the United Nations Convention on the Rights of a Child (CRC)<sup>25</sup> states:

“(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”<sup>26</sup>

21 Child Care, Protection and Justice Act (CCPJ) (No. 22 of 2010) sections 46 and 47.

22 Cap 8:01 of the Laws of Malawi.

23 Presentation by Hon. Justice Twea, SC, JA at a workshop for magistrates on imprisoning mothers with their children held in Lilongwe on 15 December 2015. The workshop was organised by CHREAA and SALC.

24 The United Nations Convention on the Rights of a Child (CRC) and the Organisation of African Union Charter on the Rights and Welfare of the African Child (African Children’s Charter) are both recognised in section 4(c) of the Third Schedule (Guiding Principles in Matters Concerning Children) in the CCPJ.

25 Malawi ratified the CRC on 2 January 1991.

26 CRC, article 3.

The CRC recognises the need to ensure that a child is not separated from their parent, except when in the best interests of the child and when certain conditions are met:

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...”<sup>27</sup>

Article 6(2) of the Convention also provides that “States Parties shall ensure to the maximum extent possible the survival and development of the child.” While article 27(1) of the Convention provides that States Parties should “recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”

The African Charter on the Rights and Welfare of the Child, which Malawi ratified on 16 September 1999, has specific provisions on imprisonment of mothers. It provides:

“States Parties to the present Charter shall undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) *ensure that a non-custodial sentence will always be first considered when sentencing such mothers;*
- (b) *establish and promote measures alternative to institutional confinement for the treatment of such mothers;*
- (c) *establish special alternative institutions for holding such mothers;*
- (d) *ensure that a mother shall not be imprisoned with her child;*
- (e) *ensure that a death sentence shall not be imposed on such mothers;*
- (f) *the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.”*<sup>28</sup>

General Comment 1 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)<sup>29</sup> strengthens the understanding of article 30 of the African Charter on the Rights and Welfare of the Child and outlines the legislation, policy and practice necessary to achieve its full implementation. Importantly, the General Comment clarifies that the provisions of article 30 do not just apply to mothers but also to fathers and primary care-givers who may be a foster parent or another family member such as a grandparent.<sup>30</sup> The General Comment also emphasises the importance of treating children whose primary care-givers are in conflict with the law in a way that is nuanced, informed and based on actual information about their situation.<sup>31</sup> It also clarifies that article 30 applies when primary care-givers are accused or found guilty of infringing the criminal law. This encompasses all stages of criminal proceedings starting from arrest and continuing through to release and integration.

In addition to binding conventions, the United Nations also has guidelines on incarceration of care-givers and children in prison. On incarceration of women who are care-givers, the United

27 *Id.*, article 9(1).

28 African Charter on the Rights and Welfare of the Child, article 30 (emphasis added).

29 ACERWC General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on “Children of Incarcerated and Imprisoned Parents and Primary Caregivers” (2013).

30 *Id.* para. 10.

31 *Id.* paras. 14 -16.

Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)<sup>32</sup> provide:

Rule 61

“When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative nonseverity and nature of the criminal conduct, in the light of women’s caretaking responsibilities and typical backgrounds.”

Rule 64

“Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.”

On children living in prison, the Bangkok Rules provide under rule 49 that:

“Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.”

Where children are allowed in prison, rule 51 of the Bangkok rules provides that:

“(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.

(2) The environment provided for such children’s upbringing shall be as close as possible to that of a child outside prison.”

## Current Practice on Courts’ Consideration of Best Interests of the Child in Decisions to Incarcerate Care-givers

In the past, courts in Malawi have held a rather stringent view that hardship to families and dependents is an inevitable consequence of indulging in criminal activities and has not taken this into consideration as a mitigating circumstance, suggesting that accused persons should think of all consequences before they engage in criminal activities. In *Republic v Cosmas and Others*, Chipeta J states:

“Under the applicable principles of sentencing in criminal procedure courts are normally guided by the principle that before one embarks on a path of crime, it is incumbent on him to take these circumstances on board. A man who opts for and goes ahead to commit a crime should factor in the possibility that if the long arm of the law catches up with him and accords him a custodial penalty his family will suffer and that courts are not encouraged to be moved by such pleas.”<sup>33</sup>

In another case, the same Chipeta J completely dismissed a submission that the applicant was breastfeeding as an exceptional circumstance to entitle the accused bail in a homicide matter.<sup>34</sup>

32 Resolution 2010/16.

33 *Republic v Cosmas and Others*, Criminal Case No. 53 of 2000, (2001) MWHC 11.

34 *Gadama v Republic* High Court Misc. Criminal Application No. 145 of 2001.

Recently, the courts have considered child care responsibilities in several decisions on whether to incarcerate primary care-givers in Malawi. In *Dickson and Another v Republic*,<sup>35</sup> in considering the granting of bail to the applicant who had a child with her in prison, Singini J (as he then was) stated that “one compelling factor for the grant of bail is the plight of this baby who is in custody with the applicant as her mother and in my judgment, the best interest of the child requires that the mother be released on bail”. In the recent High Court case of *Alasoni v Republic*,<sup>36</sup> Kapindu J, in considering whether to grant bail pending confirmation of sentence, stated that the best interests of the child of the applicant who was with her in prison required that she be released on bail.

It is well established in Malawi that in deciding on an appropriate sentence, the court will investigate if the sentence fits the offence (crime), the victim, the offender, and the public interest or public goals.<sup>37</sup> In *Republic v Keke*<sup>38</sup> the High Court indicated that in considering the offender, a sentencer must pay attention to gender. For example, a prison sentence should be reduced where the woman is pregnant. In *Republic v Jeke*,<sup>39</sup> the High Court considered the fact that the applicant was “still a young woman of about 20 years and she has a young child to look after”, and decided to reduce the sentence on humanitarian grounds.<sup>40</sup>

This approach which tends to look at children as a “circumstance” relating to the offender has been criticised by some, who argue that courts sentencing primary care-givers are obliged to apply a child-centred approach and not to merely treat children as a circumstance of an accused. It is argued that a child-centred approach requires a fresh approach to sentencing, adding an extra element to the responsibilities of a sentencing court over and above the traditional sentencing approach already described.<sup>41</sup>

Most recently in *Republic v Masauko*,<sup>42</sup> the High Court, in sentencing, also considered the best interests of children who would be separated from their mother who was accused of killing her epileptic son. The accused was the primary care-giver of five children, including the epileptic child, and appeared to have been under immense mental and emotional stress. Although eventually deciding on a custodial sentence in that case, Justice Tembo, considered the accused’s other four children to whom she was the primary care-giver, stating that:

“As rightly observed by the accused person, her incarceration will result in her being taken away from her children who need her support. It is well that the law provides that unweaned children be received in prison and provided necessities at public expense....However there is still need to consider the needs of the other weaned children of the accused person for whom the accused person was the primary or sole carer. Each child has a Constitutional right to know and to be raised by the parents as provided in section 23(3) of the Constitution. The fact that in this case the mother is a convict does not in the view of the court take away the right of the children to know her as a parent.”<sup>43</sup>

35 Miscellaneous Criminal Case No. 107 of 2007 (High Court) (Lilongwe District Registry) (unreported).

36 Miscellaneous Criminal Application No. 72 of 2015 (High Court) (Zomba) (unreported).

37 *Republic v Keke* (404 of 2010) (2013) MWHC 450.

38 *Id.*

39 *Republic v Jeke* (139 of 2008) (2008) MWHC 51.

40 *Id.*

41 See *M v State* CCT 53/06 (2007) ZACC 18, a South African Constitutional Court decision discussed in the following section. In particular, see the arguments by the Centre for Child Law, University of Pretoria who were admitted as *amicus curiae*.

42 Principal Registry Homicide Cause No. 6 of 2015.

43 *Id.* (emphasis added).

This case is encouraging as it was the State who initially raised concern around the impact of imprisonment on the accused's children. Of particular concern to the State was the accused's youngest child who was one year old and still breastfeeding.<sup>44</sup> The Court then went on to make important remarks about considerations to be followed when the child was eventually separated from the mother, as well as the impact of imprisonment on the accused's older children, highlighting that consideration should be made to allow those children to be able to continue a relationship with their mother.<sup>45</sup>

In the *Masauko* case, the Court was guided by section 321J of the Criminal Procedure and Evidence Act of Malawi which allows the High Court to request any reports that may aid it in sentencing. The magistrate may also order pre-sentencing reports which enable a court to inquire into the circumstances of the person being sentenced, including whether they are the primary care-giver of any children and the effect that their incarceration will have on their children. However, it is not clear to what extent these pre-sentencing reports are used, particularly in the lower courts where most women interface with the legal system. There is a need for presiding officers to be capacitated with enough information to strengthen their jurisprudence by looking to international and regional standards such as the ACERWC's General Comment No. 1 and comparative law from the Southern Africa region.<sup>46</sup>

## Comparative Jurisprudence

In addition to standards set by the international and regional human rights framework, one of the leading cases on judicial approach to sentencing of primary care-givers in the region is the South African Constitutional Court case of *M v State*.<sup>47</sup> In this case, the Court was asked to determine the duties of the sentencing court when the person being sentenced is the primary care-giver of minor children in the light of section 28(2) of the Constitution of the Republic of South Africa<sup>48</sup> and any relevant statutory provisions. The Court held:

“Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.”<sup>49</sup>

The South African Constitutional Court proposed the following guidelines in order to promote

44 *Id* 3.

45 *Id* 6 and 7.

46 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) “General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on Children of Incarcerated and Imprisoned Parents and Primary Care-givers” (2013).

47 CCT 53/06 (2007) ZACC 18.

48 Section 28(2) of the Constitution provides that “[a] child's best interests are of paramount importance in every matter concerning the child.”

49 *M v State* CCT 53/06 (2007) ZACC 18, para. 33.



uniformity of principle, consistency of treatment and individualisation of outcome:

“(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) ...The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.

(c) If ... the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences..., then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.”<sup>50</sup>

The United Kingdom, has sentencing guidelines for magistrates. These require magistrates to consider the age and maturity of the offender, and the offender’s responsibility for minor dependants as important mitigating factors.<sup>51</sup> In *R (on the application of Stokes) v Gwent Magistrates Court*,<sup>52</sup> the High Court stated that a court considering an order to imprison which would separate completely a mother from her young children with unknown consequences of the effect of that order on those children, had to take into account the need for proportionality and ask itself whether the proposed interference with the children’s right to respect for their family life was proportionate to the need which made it legitimate.<sup>53</sup> Committal to prison must be a remedy of final resort if all else has failed. In *R (on the application of P and Q) v Secretary of State for the Home Department*,<sup>54</sup> the Court of Appeal stated the following:

“... If the passing of a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound ... to carry out the balancing exercise ... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations ... ask for more.”<sup>55</sup>

In *R (on the application of Aldous) v Dartford Magistrates’ Court*,<sup>56</sup> the Court of Appeal emphasised the need to recognise the detrimental consequences of imprisoning mothers:

“The existence of children cannot of course keep a person out of prison who should properly be sent to prison, but a sentencing court needs to be able to bear in mind what the effect on the children will be, and, if there are children and if the court does not have the information it needs in order to assess the effect of the parent’s imprisonment on them, then the court must make

50 *Id* para. 36 (emphasis added); affirmed in *S v S (Centre for Child Law as Amicus Curiae)* (2011) (7) BCLR 740 (CC).

51 “Magistrates’ Court Sentencing Guidelines” *Sentencing Guidelines Council* (2008) 223 available at [https://www.sentencingcouncil.org.uk/wp-content/uploads/MCSG\\_web\\_-\\_October\\_2014.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/MCSG_web_-_October_2014.pdf) (last accessed: 19 November 2016).

52 (2001) All ER (D) 125 (Jul).

53 *Id* para. 36.

54 (2001) EWCA Civ 1151.

55 *Id* para. 79.

56 (2011) EWHC 1919 (Admin).

enquiries so that it is properly informed. Those enquiries were not made in this case.<sup>57</sup>

## Conclusion

The impact of incarceration of care-givers needs to be carefully examined by all stakeholders in the sentencing process. Domestic law, international treaties, and regional human rights treaties to which Malawi is a signatory all have progressive provisions concerning the rights of children whose care-givers are in conflict with the law. Goal 16 of the Sustainable Development Goals suggests that peace, justice and effective, accountable and inclusive institutions are at the core of sustainable development. Part of achieving this is through protecting fundamental freedoms in accordance with national legislation and international agreements.<sup>58</sup> Children's best interests and their rights should be taken into consideration in decision-making, including in decisions relating to sentencing of care-givers.

Judicial officers can play their part by developing jurisprudence that makes children visible when making decisions about sentencing care-givers or holding them in places of detention prior to conviction. Malawi needs to adopt a standardised approach to dealing with incarceration of care-givers. Firstly, this means that it is important for Malawi to gather data about this group of children to help develop effective policy and practice. Malawi may also need to review women's interaction with the justice system, as they are most often the primary care-givers. Women tend to interact with the criminal justice system at the lowest levels, often because they commit less serious offences; they often have no access to legal advice or aid and are less likely to appeal decisions. It is for this reason that it is also important to develop a systematic process for educating judicial officers (including those at the lowest levels of the justice system), prosecutors and legal practitioners about the impact of incarceration on the rights of children, as well as consider a review of any current sentencing guidelines for lower courts to ensure that these aspects are adequately canvassed. The use of pre-sentencing reports increase children's visibility in the criminal justice system and judicial officers should be required to use these consistently. In sentencing care-givers, courts should:

- Consider the rights and the best interests of the child;
- Only sentence an offender who is the carer of young children to imprisonment if such sentence is absolutely necessary;
- Consider alternative sentences such as suspended sentences, community service or fines if a custodial sentence is not absolutely necessary. Fines should only be imposed if a proper inquiry has been done on means of income;
- Hand down a custodial sentence for the shortest term that is conceivably commensurate with the offences in question if a custodial sentence is absolutely necessary; and
- Order that the convicted care-giver be placed in a prison near her home.

Finally, Goal 16 of the SDGs recognises that justice is essential for a peaceful society. Failure to recognise the rights of children in sentencing processes may have a negative effect on their rights to food, health, well-being, and education, thus affecting related SDGs such as Goals 2 to 4. This is detrimental to building peaceful and inclusive societies.

<sup>57</sup> *Id* para. 16.

<sup>58</sup> Target 16.10.